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No. 08-917

In the Supreme Court of the United States

Rosemarie McSwain,

Petitioner,

v.

Susan Davis, Warden,

Respondent.

On Petition for Writ of Certiorari to
The United States Court of Appeals
for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where a State prisoner's habeas petition was dismissed as untimely under the statute of limitations and the Sixth Circuit denied Petitioner's request to remand for a hearing on equitable tolling, was that denial a jurisprudential split among circuits over the level of evidence necessary to warrant remand, or a fact-dependent exercise of discretion.

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The opinion of the Sixth Circuit (Pet. App. 1a) is available at 287 F. Appx. 450 (2008). The opinion of the United States District Court of the Eastern District of Michigan, Southern Division (Pet. App. 31a) is not reported in the Federal Supplement, but is available at 2006 U.S. Dist. LEXIS 32286.

JURISDICTION

The judgment of the Sixth Circuit was entered on July 15, 2008. Rehearing en banc was denied October 30, 2008. The petition for a writ of certiorari was filed on January 23, 2009. Jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

INTRODUCTION

Certiorari is not warranted because this case involves a fact-based exercise of discretion rather than a jurisprudential split among circuits. In essence, the Sixth Circuit simply denied a post-dismissal attempt to save a miscalculation in the statute of limitations.

Generally, a petitioner has one year from discovery of a new factual predicate to seek federal habeas review. While post-conviction review of that new claim in the State courts will toll the one-year period, it does not create a new one-year period of limitations. Here, by waiting 364-days after post-conviction review ended to file her habeas petition, Petitioner failed to account for the six months that had passed prior to seeking post-conviction review. Therefore, her petition was dismissed as untimely.

On appeal, Petitioner claimed for the first time that an evidentiary hearing was necessary to demonstrate that mental illness prevented her from complying with the statute of limitations. The United State Court of Appeals for the Sixth Circuit refused, noting Petitioner was represented by counsel when the petition was filed and that Petitioner failed to identify any support in the record for her post-dismissal claim, or even allege how her mental illness would have prevented compliance with the statute of limitations.

It is this refusal to remand, that Petitioner now seeks a writ of certiorari to challenge, arguing that the Sixth Circuit's unpublished opinion imposes a higher burden on petitioners to justify remand on equitable-tolling claims than the Third and Ninth Circuits.

Contrary to this claim, there is no jurisprudential split among the circuits. The two cases primarily relied on by Petitioner are factually distinct and recognize a court's inherent discretion to determine whether equitable tolling is justified. The Sixth Circuit's denial of remand was simply a fact-dependent exercise of that discretion.

Moreover, habeas review of a state-court adjudication is limited to the holding of this Court, and this Court has never expressly recognized the existence of equitable tolling in § 2254 cases.

STATEMENT

In 1988, following a jury trial in Kent County, Michigan, Petitioner Rosemarie McSwain was convicted of first-degree premeditated murder and sentenced to life imprisonment.[1] Her appeal was denied by the Michigan Court of Appeals in 1990 and by the Michigan Supreme Court in 1991.

Almost ten years after her conviction, Petitioner filed a motion for post-conviction review based on newly discovered evidence; specifically, the fact she had recently been diagnosed with Dissociative Identity Disorder ("DID").[2]

Following an evidentiary hearing, the trial court found a substantial likelihood that Petitioner would have been declared incompetent to stand trial or a reasonable likelihood that the jury would have decided the case differently. Accordingly, the trial court ruled that Petitioner was entitled to a new trial.

The Michigan Court of Appeals reversed, finding that although Petitioner's expert witnesses offered significant testimony regarding her current mental condition, her experts could only speculate as

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[1] Essentially, Petitioner was working as a prostitute. She threatened to kill the victim for wasting her time because he would not pay. She pulled a firearm on him, shot him, and later confessed telling cellmates she did not mean to actually kill him. (See Pet. App. 43a-45a).

[2] Petitioner raised numerous claims on direct review, none of which alleged mental illness. (See Pet. App. 45a).

to her condition at the time of the offense or trial.[3] As stated by the Michigan Court of Appeals:

> [W]e are left with the firm and definite impression that, to the extent that the trial court actually made a decision that McSwain suffered from dissociative identity disorder at the time of her trial, that decision was a mistake. Simply put, there was no direct evidence on which the trial court could have based such a decision, and the opinion testimony of McSwain's experts was at best speculative and at worst after-the-fact extrapolation. [Pet. App. 83a.]

Petitioner subsequently filed an application for leave to appeal in the Michigan Supreme Court, which was denied on September 16, 2004 (Pet. App. 41a), thus ending post-conviction review.

On September 15, 2005, one day less than a full year later, Petitioner's attorney filed her application for a writ of habeas corpus.[4]

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[3] Petitioner's trial attorney testified that he had significant experience defending clients with mental health issues and that Petitioner did not appear to be suffering from a mental illness. (Pet. App. 49a-50a). Further, the state's expert interviewed Petitioner three times, reviewed the police reports, trial transcripts, and her psychiatric records, finding no indication of DID. (See Pet. App. 59a-62a). Petitioner's experts did not review the trial transcripts or police reports – yet gave opinions as to her mental condition at the time of trial. (Pet. App. 20a).

[4] While the petition was signed by Petitioner on September 14, 2005, it was filed by counsel on September 15, 2005. Petitioner repeatedly states that her petition was filed September 14, 2005, but offers no argument for application of the mailbox rule.

Under 28 U.S.C. § 2244(d)(1)(D), a petition seeking federal habeas relief from a state conviction must be filed within one year of the date on which the factual predicate of the claim could have been discovered through the exercise of due diligence. Here, the latest date that Petitioner could be said to have discovered the factual predicate for her mental-incompetence claim was February 5, 1998.[5] While post-conviction review tolls the statute of limitations under § 2244(d)(2), it does not reset the statute or create a new date from which the one-year period begins to run.[6] Thus, Petitioner had "less than six months from the conclusion of her state post conviction proceedings on September 16, 2004, to file her § 2254 petition." (Pet. App. 9a).

Despite the fact that her claims had been fully developed and exhausted in the State courts, Petitioner waited 364-days, until September 15, 2005, to file her habeas petition. (Pet. App. 120a). By waiting so long, Petitioner failed to account for any time having elapsed under the statute of limitations prior to seeking post-conviction review. The petition was dismissed by the district court as untimely.

The Sixth Circuit granted Petitioner's request for a certificate of appealability and appointed counsel. After reviewing the briefs and hearing oral argument, the Sixth Circuit agreed that the petition was untimely and barred by the statute of limitations.

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[5] Petitioner was diagnosed with DID on August 15, 1997. That diagnosis was confirmed on February 5, 1998. The court of appeals gave Petitioner the benefit of the later date of February 5, 1998 in calculating the limitations period. (Pet. App. 9a)

[6] See *Vroman v. Brigano*, 346 F.3d 598, 602 (6th Cir. 2003); *Searcy v. Carter*, 246 F.3d 515, 519 (6th Cir. 2001)

Petitioner argued for the first time on appeal to the Sixth Circuit that she was entitled to an evidentiary hearing on whether her mental illness impaired her ability to comply with the statute of limitations. The Sixth Circuit declined to remand, noting that the petition was filed by counsel and finding nothing in the record – even allegations – to support Petitioner's post-dismissal claim. (Pet. App. 14a-15a). It is this denial of remand for a second evidentiary hearing that Petitioner now seeks a writ of certiorari to challenge.

Petitioner argues that the Sixth Circuit's unpublished opinion sets forth a different burden of proof for entitlement to remand for a hearing on equitable tolling than the Third and Ninth Circuits. In support of this claim, Petitioner relies on two cases: *Nara v. Frank*[7] and *Laws v. Lamarque*.[8] As detailed herein, this case does not involve a jurisprudential split with *Nara* and *Laws*. Indeed, both cases were cited by the Sixth Circuit as support for its decision. Contrary to Petitioner's claims, this case involves nothing more than a fact-bound determination involving the proper exercise of discretion.

Moreover, habeas review under 28 U.S.C. § 2254(d) is limited to clearly established precedent of this Court, and this Court has never held that equitable tolling applies to § 2254 cases.[9] Nor is there any reason to expand the already ample tolling provisions expressly drafted into the statute of limitations by Congress.[10]

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[7] *Nara v. Frank*, 264 F.3d 310, 320 (3rd Cir. 2001).
[8] *Laws v. Lamarque*, 351 F.3d 919, 923 (9th Cir. 2003).
[9] See *Lawrence v. Florida*, 549 U.S. 327, 336 (2007).
[10] See 28 U.S.C. § 2244(d)(1)(B)-(D) and § 2244(d)(2).

While the existence of equitable tolling is a condition precedent to remand for a hearing on whether equitable tolling is warranted, it is unnecessary to reach that issue in this case. Even assuming equitable tolling, this case simply involves the exercise of discretion over a particular set of facts.

REASONS FOR DENYING CERTIORARI

Petitioner filed her petition for federal habeas relief after the statute of limitations expired. On appeal she argued for the first time that she was entitled to a second evidentiary hearing, this time on whether her mental illness prevented compliance with the statute of limitations. The Sixth Circuit denied her claim, noting the petition was filed by counsel, that Petitioner had never alleged that her illness affected her ability to comply with filing requirements until after her petition was dismissed, and that Petitioner failed to offer any explanation as to how her mental illness affected her or her attorney's ability to file her petition sooner than 364-days after post-conviction review ended.

Petitioner now seeks a writ of certiorari to challenge the denial of remand, arguing that the Sixth Circuit's unpublished opinion represents a jurisprudential split among circuits over the amount of evidence a petitioner must present to be entitled to remand. Contrary to this claim, this case simply involves the exercise of discretion over a specific factual record and brings finality to a twenty-year-old conviction.

The petition for a writ of certiorari should be denied because (1) the Sixth Circuit correctly concluded that Petitioner is not entitled to equitable tolling; (2) that decision was a fact-dependent exercise of discretion rather than a jurisprudential split; and (3) this Court has never held that equitable tolling applies to habeas review of state-court adjudications.

1. The record does not support Petitioner's post-dismissal claim of entitlement to equitable tolling.

In *Pace v. DiGuglielmo*, this Court explained that a litigant seeking equitable tolling bears the burden of establishing "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way."[11] Although this Court has never squarely held that equitable tolling applies to § 2254 cases,[12] Petitioner correctly asserts that all of the federal appellate circuits have done so.[13] In fact, the Sixth Circuit is one of the more generous in its application, having identified five factors to consider in determining whether equitable tolling is appropriate:

1. Notice of the filing requirement;
2. Constructive knowledge of the filing requirement;
3. Diligence in pursuing one's rights;
4. Absence of prejudice to the respondent; and
5. Reasonableness in remaining ignorant.[14]

In this case, Petitioner claimed for the first time after her petition was dismissed that she was entitled to equitable tolling because her mental illness

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[11] *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

[12] *Pace*, 544 U.S. at 418, fn 8 ("we assume without deciding its application for purposes of this case"). See also *Lawrence v. Florida*, 549 U.S. 327, 336 (2007) ("We have not decided whether § 2244(d) allows for equitable tolling").

[13] See Petition for Writ of Certiorari, footnote 1 citing cases.

[14] See *Barry v. Mukasey*, 524 F.3d 721, 724 (6th Cir. 2008); *Keenan v. Bagley*, 400 F.3d 417, 421 (6th Cir. 2005).

prevented her from complying with the statute of limitations.[15]

The Sixth Circuit denied this claim, finding nothing in the record to support a causal connection between her mental illness and her ability to file a timely petition. (Pet. App. 12a). "Indeed, the record evidence indicates McSwain was able to pursue both direct and collateral challenges to her conviction in the state courts notwithstanding her mental illness" and "McSwain was also represented by an attorney at the time she filed her federal habeas petition, as evidenced by the fact that her federal habeas petition was prepared and signed by an attorney." (Pet. App. 12a-13a). In fact, as the Sixth Circuit explained, Petitioner's pre-appeal position was that her petition was timely:

> McSwain has not alleged any facts that would suggest that her mental illness prevented her from timely filing her habeas petition. She indicated in her untimely response to the motion to dismiss that she believed her petition was timely because it was filed within one year of the conclusion of her state post-conviction proceedings. She did not assert that she was prevented from filing it in a timely manner because of her mental illness. [Pet. App. 13a.]

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[15] In her *strikingly* well-drafted *pro se* response to the motion to dismiss, Petitioner flatly asserted she "likely suffers periods of incompetency which would effect her ability to file a timely habeas petition." (Pet. App. 133a-137a).

In essence, Petitioner's claim is an attempt to save a miscalculation in the statute of limitations rather than an actual impediment that prevented the timely filing of the petition. Petitioner still fails to allege any specific connection between her mental illness,[16] and the fact her attorney waited 364 days to file the petition.[17] Nor does Petitioner explain why she never alleged that her mental illness impaired her ability to comply with the statute of limitations until after dismissal.[18]

Even assuming equitable tolling applies to § 2254 cases, the Sixth Circuit correctly denied this claim.

2. The two cases Petitioner relies on represent courts exercising discretion over different facts, not a jurisprudential split.

For the first time on appeal, Petitioner requested an evidentiary hearing on whether her mental illness prevented compliance with the statute

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[16] The two cases Petitioner primarily relies on in support of her petition for certiorari both recognize mental incompetence alone is not a per se reason to toll the statute of limitations. Rather, the petitioner must show some causal connection between the alleged incompetence and ability to file a timely petition. See *Nara v. Frank*, 264 F.3d 310, 320 (3rd Cir. 2001) and *Laws v. Lamarque*, 351 F.3d 919, 923 (9th Cir. 2003).

[17] "[A] petitioner's reliance on the unreasonable and incorrect advice of his or her attorney is not a ground for equitable tolling." *Allen v. Yukins*, 366 F.3d 396, 403 (6th Cir. 2004), citing *Jurado v. Burt*, 337 F.3d 638, 644-45 (6th Cir.2003).

[18] In fact, contrary to such a claim, Petitioner's own expert witness acknowledged at the state court evidentiary hearing that persons with *did* can be competent to stand trial and that Petitioner was currently competent to stand trial. (Pet. App. 21a)

of limitations. The Sixth Circuit declined to remand because "McSwain has not alleged any facts, which, if true, would show that her mental illness prevented her from timely filing her habeas petition once she became aware of her DID diagnosis[.]" (Pet. App. 15a). While Petitioner asserted in her late response to the motion to dismiss that she "likely suffers periods of incompetency which would effect her ability to file a timely habeas petition," the Sixth Circuit found this generalized and unsupported assertion insufficient. (Pet. App. 14a-15a). The Sixth Circuit further noted the motion for an evidentiary hearing filed with Petitioner's late response was for the purpose of presenting evidence on competence to stand trial, not ability to comply with the statute of limitations. (Pet. App. 15a). Thus, the Sixth Circuit concluded "McSwain's suggestion, raised for the first time on appeal, that she might be able to produce some evidence that her mental illness prevented her from timely filing her habeas petition lacks a sufficient factual basis to warrant an evidentiary hearing." (Pet. App. 15a).

It is this specific ruling that Petitioner now seeks a writ of certiorari to challenge.[19] Petitioner claims the Sixth Circuit's conclusion represents a jurisprudential split arising from the Third and Ninth Circuits as to the burden of proof necessary to warrant remand for a hearing. In support, Petitioner primarily relies on two cases: *Nara v. Frank*,[20] and *Laws v. Lamarque*.[21] Both are factually distinct.

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[19] Petitioner does not appear to challenge the Sixth Circuit's ruling that she is not entitled to equitable tolling on the basis of actual innocence or denial of remand on that claim. (Pet. App. 16a-26a).

[20] *Nara*, 264 F.3d at 312.

[21] *Laws*, 351 F.3d at 921.

In *Nara*, the petitioner was severely suicidal and hospitalized numerous times, once for approximately 16 months.[22] He filed several motions for post-conviction review in the state courts challenging the validity of his guilty plea based on mental incompetence.[23] He then filed a petition seeking federal habeas relief which the district court dismissed as untimely.

On appeal, the Third Circuit remanded for an evidentiary hearing, based on the petitioner's assertions that his mental impairment and ineffective assistance of counsel prevented compliance with the statue of limitations.[24] Regarding the mental-impairment aspect, the Third Circuit found that evidence of an ongoing incompetency warranted remand for an evidentiary hearing:

> In Nara's case, there was no evidence in the record that Nara's current mental status affected his ability to present his habeas petition. However, because Nara originally filed his habeas petition pro se, and because he has presented evidence of ongoing, if not consecutive, periods of

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[22] *Nara*, 264 F.3d at 312.

[23] *Nara*, 264 F.3d at 313.

[24] The petitioner in *Nara* did not seek remand for a hearing solely on alleged mental impairment. He also claimed "that his attorney failed to inform him when the Pennsylvania Supreme Court denied review of his motion to withdraw his guilty plea; that his attorney refused to remove herself as appointed counsel after the Pennsylvania Supreme Court decision, thus preventing him from 'moving his case forward;' that his attorney led him to believe that she was going to file the federal habeas petition on his behalf; and that his attorney told him that there were no time constraints for filing a petition." *Nara*, 264 F.3d at 320.

> mental incompetency, an evidentiary hearing is warranted in order to develop the record.[25]

The petitioner in *Laws* was convicted in 1993 and filed a State habeas petition in 2000. He alleged in that petition that the delay "was attributable to psychiatric 'medication which deprived [Laws] of any kind of consciousness.'"[26] While his subsequent federal habeas petition did not raise the incompetence claim, he argued in response to a motion to dismiss that his mental impairment prevented compliance with the statute of limitations.[27]

The district court denied equitable tolling, finding that Laws had failed to show his mental impairment made it "impossible" to comply with the statute of limitations. The Ninth Circuit reversed because the district court had denied the petitioner an opportunity to develop his allegations:

> On this record, the district court erred in granting judgment against Laws based upon the papers then before it. It is enough that Laws "alleged mental incompetency" . . . in a verified pleading. . . The district court should then have allowed discovery or ordered expansion of the factual record.[28]

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[25] *Nara*, 264 F.3d at 320.

[26] *Laws*, 351 F.3d at 921.

[27] "The memorandum, evidently prepared by another inmate, argued that Laws's 'psychotic dysfunction' precluded his timely filing. Laws also contended he was able to file his federal and state petitions in 2000-2002 only with the help of a jailhouse lawyer." *Laws*, 351 F.3d at 922.

[28] *Laws*, 351 F.3d at 924 (citation omitted).

What distinguishes this case from *Nara* and *Laws* is the specific set of facts before the reviewing courts. The petitioner in *Nara* was repeatedly hospitalized for extended periods of time. The petitioner in *Laws* had repeatedly alleged that his mental illness impaired his ability to comply with filing requirements. Here, as the Sixth Circuit noted, it is neither obvious how Petitioner's mental illness impaired her or her attorney's ability to comply with the statute of limitations, nor did Petitioner make any such allegation until after her petition was dismissed.

The Sixth Circuit was clearly aware of *Nara* and *Laws*; both cases are cited in its opinion, not as contrary authority, but as support for the proposition that the mere existence of a mental illness does not automatically justify equitable tolling. (Pet. App. 12a). Furthermore, both *Nara* and *Laws* recognize that granting remand to develop the record on equitable tolling is a matter of discretion rather than a specific set of standards or benchmarks.[29] And that is precisely what happened in this case – an exercise in discretion on a specific set of facts, not a jurisprudential split over burdens of proof.

The Sixth Circuit correctly regarded Petitioner's equitable-tolling claim as a post-dismissal attempt to save a miscalculation in the statute of limitations and brought finality to a twenty-year old conviction.

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[29] See *Nara*, 264 F.3d at 320 ("courts have discretion to apply principles of equity"); *Laws*, 351 F.3d at 924 ("Of course, a petitioner's statement, even if sworn, need not convince a court that equitable tolling is justified should countervailing evidence be introduced").

3. Moreover, this Court has never held that equitable tolling applies to § 2254 cases, let alone recognized entitlement to remand based on unsupported post-dismissal assertions.

Federal habeas review of a state conviction is limited to the holdings of this Court.[30] On at least two occasions, this Court has expressly noted that it has never held equitable tolling applies to § 2254 cases.[31] While that issue is not squarely presented by Petitioner, it is a condition precedent to her claim for remand; for if there is no entitlement to equitable tolling there would be no entitlement to remand on the issue of equitable tolling.[32]

As drafted by Congress, 28 U.S.C. § 2244(d) already sets forth four ways in which the statute of limitations is effectively tolled:

- First, under subsection (d)(1)(B), the one-year statute of limitations does not start until any unconstitutional impediment created by state action is removed.

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[30] 28 U.S.C. § 2254(d)(1); See also *Knowles v. Mirzayance*, __ U.S. __; 129 S. Ct. 1411, 1419 (2009); *Wright v. Van Patten*, __ U. S. __; 128 S. Ct. 743, 747 (2008); *Carey v. Musladin*, 549 U.S. 70, 74 (2006).

[31] *Pace*, 544 U.S. at 418; *Lawrence*, 549 U.S. at 336.

[32] As explained in *Williams v. Taylor*, Congress intended to codify the existing rule that habeas relief is not available upon a rule of law not clearly established at the time the state conviction became final. *Williams v. Taylor*, 529 U.S. 362, 380 (2000). Here, equitable tolling was not recognized at the time Petitioner's conviction became final or at the time post-conviction review ended.

- Second, under subsection (d)(1)(C), petitioners get a new one-year period for claims based on newly recognized retroactive constitutional rights.

- Third, subsection (d)(1)(D) creates a new one-year period from the date a petitioner could have discovered a new factual predicate.

- Finally, subsection (d)(2) expressly tolls the statute of limitations during post-conviction review in the state courts.

Congress could have included a blanket tolling provision.[33] Instead, Congress drafted a detailed and specific set of circumstances under which the statute of limitations would toll.[34] If the purpose of the statute of limitations is to bring finality to state convictions,[35]

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[33] "Congress, the Rule writers, and the courts have developed more complex procedural principles that regularize and thereby narrow the discretion that individual judges can freely exercise." *Felker v. Turpin*, 518 U.S. 651, 664 (1996).

[34] As this Court explained when considering the Quiet Title Act, "[e]quitable tolling is not permissible where it is inconsistent with the text of the relevant statute" and "by providing that the statute of limitations will not begin to run until the plaintiff 'knew or should have known of the claim of the United States,' [the Act] has already effectively allowed for equitable tolling." *United States v. Beggerly*, 524 U.S. 38, 48 (1998). A similar provision appears in § 2244(d). See also *United States v. Brockamp*, 519 U.S. 347, 352 (U.S. 1997).

[35] The statute of limitations "serves the well-recognized interest in the finality of state court judgments," encouraging litigants to "exhaust all state remedies and then to file their federal habeas petitions as soon as possible." *Duncan v. Walker*, 533 U.S. 167, 179, 181 (2001).

there is no reason to expand those circumstances to include general equitable tolling.[36]

Here, operation of the statute of limitations as drafted by Congress allowed Petitioner ample time to present her claims. The statute did not begin running until she discovered the factual predicate for her claim ten years after being convicted, § 2244(d)(1)(D), and the statute was tolled for five more years during post-conviction review, § 2244(d)(2). After exhausting her new claim in the State courts, Petitioner still had six months to file her habeas petition. Now, despite failing to offer any explanation as to how her mental illness prevented her or her attorney from filing already developed claims within that time period, Petitioner seeks equitable tolling for an additional six months, which is what this case is really about – a post-dismissal attempt to rescue a miscalculation in the statute of limitations, not a jurisprudential split among the circuits requiring resolution by this Court.

If certiorari were to be granted, it would really be on the issue of whether equitable tolling applies to § 2254 cases, not on the degree of discretion appellate courts have over whether to grant remand. However, given that the Sixth Circuit's decision in this case is so tied to an exercise of discretion over a specific set of facts, Respondent requests that certiorari simply be denied.

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[36] While similar to § 2244(d), the statute of limitations for habeas review of federal custody is not identical. See 28 U.S.C. § 2255(f). Nor need it serve "principles of comity, finality, and federalism." *Duncan*, 533 U.S. at 178, quoting *Williams*, 529 U.S. at 436.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted

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